Letter Ruling 99-8: Sales Tax on Banana Ripening Agent and Generator Loans

April 1, 1999

You request a letter ruling on the application of the Massachusetts sales tax, G.L. c. 64H, to sales of ********** ("the Product"), a product registered with the Environmental Protection Agency as a pesticide. In addition, you ask whether you should be collecting use tax on the loan of ********** Ethylene Generators ("generators") to produce warehouses located in Massachusetts, and if not, whether the warehouses must present you with an exemption certificate.

I. FACTS

********** ("Company") is a foreign corporation in the business of supplying the Product and loaning generators to produce warehouses located in Massachusetts. The produce warehouses, which may be owned by various retail store chains, act as distribution centers that send ripened produce to retail stores.

The Product, which is 92.46% ethanol, and the generators are used to ripen produce in order to prepare it for sale to retail consumers. For example, when a produce warehouse purchases bananas from its supplier, the bananas are in an unsaleable state -- stone green in color. Upon arrival, the unripened bananas are placed in an atmospherically controlled room, called a ripening room. According to industry practice the generator is loaned to the warehouse at no charge by the Company. It is then placed in the room and filled with the Product. The generator vaporizes the Product, producing ethylene gas. The ethylene gas, in turn, triggers the bananas' natural ripening process. Once triggered, the bananas produce their own ethylene gas. The rooms are then vented and cooled. At this point, the bananas are ready for sale to the consumer. This process is used for various other fruits such as tomatoes, kiwi, and avocados.

II. RULING

For reasons discussed below, we rule that the sale of the Product is exempt from sales tax pursuant to G.L. c. 64H, § 6(p)(3), which exempts, in pertinent part, sales of insecticides , fungicides, seed inoculants, seed disinfectants, and plant hormones, as well as "other substances commonly regarded in the same category and for the same use." No exemption certificate need be presented to claim this exemption. We also rule that the "loan" of the generator at no charge to produce warehouses does not involve a sale of tangible personal property. Therefore, no sales tax is due on the transaction. With respect to the applicability of Massachusetts use tax, if the generator was not purchased with the knowledge that it would be loaned to Massachusetts customers, no use tax is due on this portion of the transaction. If the generator were purchased with the knowledge that it would be loaned to Massachusetts customers, the Company owes use tax on its purchase of the

generator at the rate of five percent of the purchase price.

III. DISCUSSION

Massachusetts imposes a five percent sales tax on sales at retail of tangible personal property by any vendor in Massachusetts. See G.L. c. 64H, § 2. A "sale at retail" is a sale of tangible personal property for any purpose other than resale in the regular course of business. G.L. c. 64H, § 1. A sale is also defined to include any transfer of title or possession for consideration, including a lease or rental. See G.L. c. 64H, § 1. Included within the definition of a sale is "[a] transfer for consideration of title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication." G.L. c. 64H, § 1. However, professional, insurance, or personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made are excluded from the sales tax.

The sales price upon which the excise is based is "the total amount paid by a purchaser to a vendor as consideration for a retail sale, including the cost of materials used, any amount paid for any labor or services that are part of a sale, and the cost of transportation of the property prior to its sale at retail. See G.L. c. 64H, § 1. Generally, the sales tax is collected by the vendor from the purchaser, and the vendor then pays the sales tax to the Department of Revenue. See G.L. c. 64H, §§ 2, 3.

The exemptions to the sales tax are found in Section 6 of Chapter 64H. Section 6(p) exempts, in pertinent part, "sales of fertilizer, including ground limestone, hydrated lime, insecticides, fungicides, seed inoculants, seed disinfectants and plant hormones, as well as other substances commonly regarded in the same category and for the same use . . . ." G.L. c. 64H, § 6(p)(3). The Commissioner has previously ruled that certain pesticides and pesticide enhancers are exempt under this provision. See, e.g., Letter Ruling 94-9, citing Letter Rulings 81-34; 82-55. In Letter Ruling 94-9, we pointed out that Section 6(p)(3) includes not only the expressly listed items, but also other substances that are commonly regarded in the same category and for the same use. Noting that the product then at issue (a surfactant for use in water-based pesticide formulations) was used in conjunction with pesticides and with liquid fertilizers to provide increased coverage, rain fastness and foliar uptake, and that the product had other uses as a soil wetting agent and as a dew control agent, we ruled that the product satisfied the conditions set forth in the statute in that it may be regarded in the same category and for the same use as fertilizers or pesticides.

The Product at issue here is registered as a pesticide with the Environmental Protection Agency and is therefore a substance "in the same category" as other insecticides. Although it may not be used primarily as a pesticide under these facts, it is used to ripen produce into an edible and saleable commodity. While ripening agents are not among those expressly enumerated items in Section 6(p)(3), their use may be likened to those enumerated items that are used to promote the growth process of certain types of plants. As such, they appear to be "for the same use" as those enumerated items in section 6(p)(3), such as plant hormones or seed inoculants. Since the Product is in the same category and for the same use as other items listed in Section 6(p)(3), it qualifies for exemption under that provision. There is no exemption certificate prescribed by the Commissioner for claiming this exemption.

With respect to the "loan" at no charge of the generators, the loan appears not to constitute a taxable sale of tangible personal property to the produce warehouses. The object of the over-all transaction with a customer is clearly the sale of the Product. The generator is provided free of charge according to industry practice. The customer invoices provided expressly state that the generators are on loan and remain the property of the Company. No separate statement and no separate charge of any kind for the loan of the generators appears on customer invoices. The Company bears the risk of loss or damage to generators loaned to customers, and pays any maintenance expenses and taxes associated with the generators. The generators may be returned by customers, and may be repaired by the company and subsequently loaned to other customers. Since there is no consideration for the transfer of sale of taxable tangible personal property, no sales tax is due and no exemption certificate need be presented. Any rental or lease of the generators is subject to sales tax, however, unless exempt under some other provision. See G.L. c. 64H, § 1.

Massachusetts imposes a use tax on the storage, use or other consumption in the commonwealth of tangible personal property purchased for storage, use or consumption within the commonwealth.

See G.L. c. 64I, § 2. You do not state whether the generators were purchased with the intent to loan them to Massachusetts customers. This ruling, therefore, takes no position on whether the use tax is actually owed. If the generators were purchased with the knowledge that they would be loaned to Massachusetts customers, the Company owes Massachusetts use tax on its purchase of the generators at the rate of 5 percent of the purchase price. See G.L. c. 64I, §§ 3, 8(f); see also DOR Directive 87-3 for specific rules for making this determination.

IV. CONCLUSION

Based on the facts as you describe them, the sale of the Product to produce warehouses for produce ripening purposes qualifies for exemption from sales tax under Section 6(p)(3) of Chapter 64H. With respect to the "loan" at no charge of the generator, the loan does not involve a sale at retail of tangible property to the produce warehouses and, hence, is not subject to sales tax. The Company, however, must pay use tax on its generators purchased for use in Massachusetts within six months of the date of purchase. Moreover, any rental or lease of such generators is subject to sales tax, unless another exemption provision applies.

Very truly yours,

/s/Frederick A Laskey

Frederick A. Laskey
Commissioner of Revenue

FAL:DMS:wrd

LR 99-8